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No. 75-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RAYMOND J. RYAN AND HELEN RYAN, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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1. Without denying the existence of the unique and unfair trilemma which the court of appeals' refusal to review has posed for the Ryans (and for any private Tax Court litigants in the future), the Commissioner rejects the applicability, in a civil tax controversy, of the salutary principles underlying the *Cohen* doctrine that finality is to be given a "practical rather than a technical construction," 337 U.S. at 546. The rejection is based on the sweeping contention that

these principles simply do "not extend to interlocutory discovery orders of the kind involved here," (Br. in Opp. 4), because, supposedly, "this Court has held, both before and after *Cohen,* that an order compelling testimony over a claim of Fifth Amendment privilege is not appealable." (*Ibid.*) Absolutely no direct authority, however, is cited for this broad claim, and the Commissioner can only point—as merely suggesting that conclusion—to one 70-year-old civil antitrust case and two criminal cases, only one of which was decided after *Cohen* (Br. in Opp. 4-5).*

It is thus instructive to note that following this Court's *Cohen* decision in 1949, its emphasis on the concept of finality as a requisite for appeal has focused on the concern about the effect of delay upon the administration of *criminal* justice (see *e.g., DiBella* v. *United States,* 369 U.S. 121 (1962); *United States* v. *Ryan,* 402 U.S. 530, 533 (1971)) and has embodied warnings that the "concept of finality as a condition for review . . . need not invite self-defeating judicial construction," 369 U.S. at 125.

Moreover, the only relevant post-*Cohen* authority suggested by the Commissioner as barring review of the Tax Court's civil discovery order, *United States* v. *Ryan, supra,* is also a *criminal* case, and even as such, it enunciated no standards incompatible with the court of appeals' review of the Tax Court's discovery order. Indeed, the rationale of the *Ryan* case, as unanimously articulated by this Court in 1971, would require review by the Seventh Circuit.

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* *Alexander* v. *United States,* 201 U.S. 117 (1906); *Cobbledick* v. *United States,* 309 U.S. 323 (1940); *United States* v. *Ryan,* 402 U.S. 530 (1971).

In *Ryan,* this Court granted certiorari to review a court of appeals' reversal of the denial of a motion to quash a grand jury subpoena duces tecum issued to Ryan under the Federal Rules of Criminal Procedure. Ryan argued that without the immediate review he had been afforded by the court of appeals, he would be forced to comply with the subpoena, and, therefore, be powerless to "avert the mischief of the order," *Perlman* v. *United States,* 247 U.S. 7, 13 (1918). This Court, without addressing the merits of the controversy, reversed the court of appeals, observing that it had "consistently held that the necessity for *expedition in the administration of the criminal law* justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." 402 U.S. at 533. (emphasis added) Thus, in *Ryan,* this Court held that in the administration of criminal justice, immediate review of a discovery order was impermissible, since Ryan could "avert the mschief of the order" by "resistance to that order with the concomitant possibility of an adjudication of contempt *if his claims are rejected on appeal.*" 402 U.S. at 533 (emphasis added).

Clearly then, even in *criminal* cases this Court's rule on finality as a condition for appeal is based on the requirement that the adverse effect of the challenged order upon a citizen would be contingent upon his "claims [being] rejected *on appeal*"—a requirement which can only be fulfilled if there is available a truly viable mechanism to prevent irreparable injury *pending* the appeal. If it were otherwise, the "mischief

of the order" would be visited upon the citizen not only if his claim were rejected on appeal—but even if it were in fact upheld by the appellate court.

This, of course, is precisely the distinction between the position of Ryan as the recipient of a grand jury subpoena duces tecum who took an appeal to the Ninth Circuit from the denial of his motion to quash—and Mr. and Mrs. Ryan as private Tax Court litigants, who are ordered to produce information by an order which they claim violates their fundamental rights. The district court's order in 1969 was not immediately appealable by Ryan as the recipient of a grand jury subpoena because he had available to him a truly viable mechanism which would have permitted the "mischief of the order" to be suspended until the appellate court either sustained or rejected his claims in the appeal from the district court's contempt adjudication. But the Ryan family, as Tax Court litigants, can only avoid the irreparable "mischief of the order" if the Tax Court imposes solely the contempt sanction. Because of the existing restrictions of the Internal Revenue Code and the Federal Rules of Appellate Procedure on stays pending appeals from Tax Court decisions, if the Tax Court were to impose any of the numerous *other* sanctions available to it under its new Rules (sanctions of the type which were and are *not* available to a district court in a criminal case such as *United States* v. *Ryan, supra*) and thus generates a multi-million dollar irremediable assessment and collection event, the Ryans, except by posting an even larger multi-million dollar bond, could not avoid the damage from the order even if their objections to it were *upheld* in the appeal from the ultimate Tax Court judgment. That is simply not an effective mechanism

to prevent irreparable injury from the discovery order pending appeal—a result as much at odds with the rationale of the *Ryan* case as it is with the *Cohen* doctrine—and additionally an impermissibly crushing burden upon the Ryans' exercise of their fundamental rights.

Accordingly, we submit that nothing in the jurisprudence of finality as a condition for review—even in the administration of *criminal* justice, where the interests of expedition are far more compelling—can justify a citizen's exposure to the kind of irreparable damage which the Ryans might suffer prior to any effective opportunity for appellate review. It follows that such a result is even less justifiable in the context of the *civil* litigation between a citizen and the sovereign, and especially in a Tax Court controversy, since (1) any delay occasioned by the initiation of appellate review of a discovery order by private litigants who claim the order violates their basic rights works essentially against the appellants by delaying action on their petition and (2) such delay can hardly damage the sovereign, since its basic interest is monetary, and if the petitioner loses the discovery order appeal and the government ultimately prevails on the merits of the basic tax controversy in the Tax Court, the sovereign is fully protected and recompensed for the delay by receiving further interest on whatever tax may be assessed.

2. The Commissioner would justify the exorbitant price which the court of appeals' decision would require the Ryans to pay simply to obtain a meaningful review of their constitutional claim (in the event a "non-contempt" sanction is imposed by the Tax Court) by claiming that had the Ryans sued in the district

court they would have had to pay the alleged tax deficiencies anyway. The argument is irrelevant. The fact is that the Ryans chose *not* to litigate in the district court but in the Tax Court, and indeed, at a time long before the new Rules of the Tax Court were in effect or even thought of. The Tax Court is an alternative method for challenging alleged tax deficiencies set up precisely so that taxpayers faced with staggering claims such as those assessed against the Ryans would *not* have to suffer enormous losses before a proper adjudication of their challenge to the assessment. The decision of the court of appeals, in conjunction with the provisions of the Internal Revenue Code and the Federal Rules of Appellate Procedure, would effectively deprive the Ryans of the intended advantages of the Tax Court route, even if the Tax Court's discovery order were ultimately held erroneous.*

CONCLUSION

The decision of the court of appeals is demonstrably incompatible with the principles of the *Cohen* doctrine, and with even the strict standards of finality in *crim-*

* The subsequent and *ex parte* immunity order—pending appeal on the grounds that it is not, in fact, co-extensive with the privilege against self-incrimination and is otherwise invalid—in no way obviates the need for review of the Seventh Circuit's refusal to review the Tax Court discovery order. This is because the express basis for the Tax Court ruling was *that the petitioners were not entitled to the privilege in the first place.* Thus, the Ryans are under a continuing obligation to comply with the Tax Court's discovery order—and are exposed to sanctions if they fail to do so—totally irrespective of the resolution of the immunity controversy. Accordingly, the present existence of that immunity order in no way diminishes the immediacy or importance of the issues raised by the court of appeals' ruling, nor the need for their resolution by this Court.

inal cases expressed as recently as 1971 in the *Ryan* case. More importantly, it is a case of first impression arising from the initial intermeshing of the new Tax Court discovery rules with the special limitations of the Internal Revenue Code and the Federal Rules of Appellate Procedure relative to review of Tax Court decisions; it substantially alters the posture of taxpayers before the Tax Court in a manner not anticipated—and probably not intended—by the Congress or the Tax Court; and endangers the fundamental rights of the litigants. In all respects the decision presents important and inevitably recurring questions warranting review by this Court.

Respectfully submitted,

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